No. [illegible]

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation,

Respondent.

Petitioners' Reply Brief

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In the
Supreme Court of the United States

October Term, 1934

No. 9

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

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Respondent.

Petitioners' Reply Brief

At Pages 97 and 98 of respondent's brief, are stated, as grounds for the affirmance of the decree of the Circuit Court of Appeals in the case at bar, the following specific reasons:

1. "The evidence clearly shows, and the trial court so found, its finding being affirmed by the Circuit Court of Appeals, that the complainant's property was systematically, arbitrarily and by the use of a wholly wrong principle and method, overvalued each year over a period of approximately five years, to the extent of more than $1,500,000.00."

2. That "the state statute with reference to suits to recover back illegal taxes paid is not an adequate legal remedy, because it involves at least four law actions, one against each county, and probably as many more as there are municipalities and school districts within the counties."

3. That the statute providing for the recovery of illegal taxes that have been paid is inadequate for the further reason that "no provision is made for the recovery of interest and because, probably, the amount that at the time of filing the law actions would have been distributed by the county treasurers to the state, could not be recovered at all."

4. That "the remedy provided by appeal under the state statute (which refers to Section 115-512, Wyo. Rev. Stat. 1931) is uncertain, inadequate and restricted to a state court."

PROPOSITION NO. 1.

As to systematic, arbitrary over-valuation of respondent's property by the use of a wholly wrong principle and method, the Court will observe by referring to the findings of fact, (R. pp. 44-46) that there is not such a finding.

There is no evidence in the Record that the trial court considered the valuation of the respondent's taxable, operative property in Wyoming for any year except 1931. Whatever evidence the respondent introduced relating to values for taxation purposes of its Wyoming property in years prior to 1931, was not sufficient to induce the court to make a finding that the allegations of the respondent's petition relating to over-valuation or intentional discrimination during the prior years in fact existed. All that the Record contains is that there was a difference of opinion between the witnesses of the respondent, being its officials, and the members of the Wyoming State Board of Equalization as to what the actual value of respondent's taxable, operative property in Wyoming was in 1931, a single year only.

PROPOSITION NO. 2.

As to Proposition No. 2, that the legal remedy was insufficient and inadequate because at least four law actions would have to be prosecuted, and probably as many more as there are municipalities and school districts within the counties, the Supreme Court of Wyoming has construed Section 89-4203, Wyo. Rev. Stat. 1931, (quoted at Page 13 of petitioners' brief) as to who are proper parties to an action to enjoin the collection of taxes or to recover taxes and assessments, and we quote from Powder River Cattle Co. v. Board of County

Comm'rs, 3 Wyo. 597, 29 Pac. 361, at Pages 607 and 608 of the Wyo. Report:

> "* * * It would appear that the object of the statute, section 3055, and the other sections of the same chapter, was to afford a simple and speedy remedy to the taxpayer, to allow him an injunction if the tax was alleged to be illegal before its collection, and a right to recover all taxes paid, after collection, from one source, and without a multiplicity of suits. * * *."

And again at Pages 610 and 611:

> "* * * The petition in the court below shows, and the law was and had been for more than four years before the enactment of section 3055, that the county treasurer should be ex officio collector of taxes. When the plaintiff in error paid its taxes which it seeks to recover, the payment was made to the collector and to the county treasurer, and, so far as county taxes proper were concerned, they were then paid over to the proper custodian of the county, and for its use and benefit. Then, if a county is a 'municipal corporation' within the meaning of the section and the proviso, no case could possibly arise where the collector of county taxes could be sued. If, on the other hand, keeping in view the language invariably used in our legislation, treating towns and cities as the only municipal corporations known to our laws, we hold that the legislature used these words in their proper sense, we have no difficulty in construing the proviso of the section reasonably and consistently with the other parts of the section. The tax collector, and he alone, is responsible; and the remedy must be pursued against him, if living, or his personal representatives if dead, for the space of one year,—the limitation of time for bringing such suits imposed by the statute,—unless the remedy is sought against a municipal corporation, a city, or town, in which case, if the tax money has been actually paid over by the municipal collector to the municipality for whose use and benefit it was levied and collected, the city or town must be sued, instead of the collector. The taxes levied for such municipalities are wholly levied and collected for their own use and benefit, and are disbursed by them; hence there is no necessity for pursuing the col-

lector, as there is but one corporation to look to for the money. The county, by law, is made the collecting agent for the state or territorial taxes, for county taxes proper, for the general school tax, and for special school district taxes, thus acting for three distinct corporate entities; while a municipality, such as a town or city, is the sole beneficiary of the tax levied by it."

In the case of Board of Comm'rs v. Searight Cattle Co., 3 Wyo. 777, 31 Pac. 268, quoting from Pages 797 and 798 of the Wyoming Report, the Supreme Court of Wyoming construes Sections 89-4201, 4202, 4203 and 4204, Wyo. Rev. Stat. 1931, in the following language:

"The remedy established in the Code (sections 3053 3056, inclusive) is a new one, and greatly simplifies the practice. It provides for enjoining a threatened illegal levy, enjoining the collection of an illegal tax, and for the recovery back of illegal taxes, and it seems that no other averment is necessary in the petition on this point than that the threatened levy is illegal, or that the tax is illegal; thus dispensing with the allegations required in equity in such cases to show irreparable injury, multiplicity of suits, accident, or mistake. If a taxpayer permits a threatened illegal levy to be made, without action on his part, or pays an illegal tax when he has a remedy by injunction to prevent its collection; he may even yet have his remedy against the collector; but if he waives these remedies, except the last, he ought not to complain that he is compelled to sue the collector to recover back the illegal tax, or urge the insolvency of that officer, or the harshness or injustice of the law which makes the collector personally responsible. The law was certainly framed as much for the benefit of the taxpayer as for that of the public. He has but one person to sue, and he is not forced to seek redress from the different corporations or bodies to whom the tax has been paid, and for whose use and benefit it was levied and collected, and thus be harassed by a number of suits. * * *."

In the case of Bunten v. Rock Springs Grazing Ass'n, 29 Wyo. 461, 215 Pac. 244, Section 89-4201, Wyo. Rev. Stat. 1931, has been construed at Page 473 of the opinion.

Section 115-311, Wyo. Rev. Stat. 1931, which is quoted at Page 13 of petitioners' brief supporting their petition for writ of certiorari, has been construed by the Supreme Court of the State of Wyoming in the case of Carton v. Board of County Comm'rs, 10 Wyo. 416, 69 Pac. 1013, cited in petitioners' brief in support of petition for writ of certiorari, and also in the case of Kelley v. Rhoads, 7 Wyo. 237, 51 Pac. 594, where, at Page 270 of the Wyoming Report, the Court says:

> "The fourth question reserved for our decision is, in substance, whether the payment of the tax by plaintiff, under the evidence, was voluntary or otherwise, and whether it was so made as would authorize its recovery if illegal. The facts as agreed to, are that the money was paid, after a refusal to pay the same upon a demand, and to prevent the seizure and sale of plaintiff's property, and the damages which would thereby accrue to the plaintiff. If that is true, we do not perceive what difference it makes, whether the threat made by the collector was that he *could* take enough sheep, or that he *would* do so. The concession that the payment was made to prevent the seizure, implies that seizure was intended or imminent, and that both parties so understood it. Under such a statute as that of 1895, requiring the same officer to assess, levy, and collect the taxes, giving him all the power of collecting officers, and applying to property of the character upon which these taxes were paid, it would not take very strong evidence of force to show a payment of the tax to be involuntary, particularly so when the statute, as in Section 3846, (which is an error in printing and should be Section 2846) enjoins upon the commissioners the duty of refunding such an amount as they should discover to be unjust. In our judgment the payment was made under such circumstances as would authorize the recovery if the tax should prove to have been illegal."

In view of the law as stated by the Wyoming Supreme Court in the above cases relating to the right to recover illegal taxes, there is no reason to fear a multiplicity of suits, but to the contrary, upon application being made therefor, a refund of illegal or erroneous taxes will be made without the necessity of any suit.

Section 89-4203, Wyo. Rev. Stat. 1931, specifically states that an action to recover taxes and assessments that have been illegally collected must be brought against the officer who made the collection, or if he is dead, against his personal representative, with the proviso that where the tax collected was not on the tax list, the corporation which made the levy must be joined in the action and that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit said tax was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments.

This statute cannot be construed to mean that when a tax has been levied and collected, but not on the tax list, which is the only authority for the county treasurer to collect taxes, he should be held responsible for the re-payment. The statute has not been construed to make the county treasurer liable for taxes that he did not collect.

The tax complained of in the case at bar was placed upon the tax list, (R. pp. 6 and 21) thus making the tax collector the only necessary defendant in an action to recover the amount paid, regardless of what disposition has been made of the money illegally or erroneously collected.

PROPOSITION NO. 3.

That the legal remedies provided by the statutes are inadequate because there is no provision made for the recovery of interest and further, because probably the amount at the time of filing the law actions would have been distributed by the county treasurer to the state and could not be recovered at all.

This proposition as to the loss by distribution to the state is clearly refuted by the authorities cited under Proposition No. 2; and as to there being no provision for interest in an action of this kind, the Supreme Court of Wyoming, in the case of Ver Straten v. Board of Comm'rs, 35 Wyo. 67, 246 Pac. 916, said, at Page 72 of the Wyoming Report, an action brought under the provisions of this statute "is in the nature of an action for money had and received, and lies when the county has received taxes which in equity and good conscience it ought to return."

The same construction as to the character of an action brought under this statute is found in an early case, Board of County Comm'rs v. Searight Cattle Co., supra, reported in 3 Wyo. 777, 31 Pac. 268; and preceding these authorities, in the first case to come before the Supreme Court of the Territory of Wyoming, Moore v. The Board of County Comm'rs of Sweetwater County, reported in 2 Wyo. 8, an illegal tax was ordered to be repaid, the order also embracing a direction to pay interest upon the amounts illegally collected from the date the collections were made.

Section 58-104, Wyo. Rev. Stat. 1931, which is as follows:

> "Rates on money due. On money due on any instrument in writing, in the absence of contract specifying the rate, or on settlement of an account from the day balance shall be agreed upon; on money received to the use of another, and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due, and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven per cent. per annum. Unsettled accounts shall bear interest after thirty days from the date of the last item thereof."

provides for the payment of interest on money retained without the owner's consent, express or implied, from the receipt thereof; and on money withheld by unreasonable delay in payment, interest shall be allowed at the rate of seven per cent. per annum.

The Supreme Court of Wyoming, in the case of Wyoming Railway Company v. Leiter, reported in 25 Wyo. 286, 169 Pac. 1, at Page 291 of the Wyoming Report, construed this statute (Sec. 58-104, Wyo. Rev. Stat. 1931) to the effect that interest should be allowed on an amount of money claimed to be due from the time the amount due was definitely determined.

Applying the reasoning in this case to the facts in the case at bar, there is no ground to assume that if the respondent paid to the county treasurer, involuntarily, a definite sum of money, the date of payment would not be the date when the unlawful retention commenced and the sum so paid would not be refunded with interest if it be established that the tax was illegal and that the county had received and retained the money which in equity and good conscience it was not entitled to retain.

PROPOSITION NO. 4.

Section 115-512, Wyo. Rev. Stat. 1931, quoted at Pages 11 and 12 of petitioners' brief, it is contended, is insufficient as providing a legal remedy because uncertain, inadequate and restricted to a state court.

This criticism is grounded upon a construction of this statute as being a judicial proceeding. Petitioners, as stated in their supplemental brief, contend that under this statute, legislative duties only have been enjoined upon a district court and that the justiciable status has not arrived when the taxpayer may select the forum of his choice, jurisdictional facts being available for that purpose, in which to litigate the question of the validity of the valuation placed upon his property as a basis of a tax levy.

Respectfully submitted,

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